

**GUAN TEIK SDN BHD
(MENGGANTIKAN LIM OO GUAN, SI MATI)**

A

v.

HJ MOHD NOOR HJ YAKUB & ORS

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COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
HASAN LAH JCA

SULONG MATJERAIE JCA
[CIVIL APPEAL NO: K-02-152-1996]
8 AUGUST 2008

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CIVIL PROCEDURE: *Parties - Representative capacity - Appointment of representative of deceased's estate - Ex parte application - Consent - Rules of the Court of Appeal 1994, r. 41*

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The appellant/defendant, by an *ex parte* notice of motion, applied for an order under r. 41 of the Rules of the Court of Appeal 1994 ('Rules') that this appeal and all the proceedings related thereto be carried on between the defendant and one Md Zaini Haji Mohd Noor ('Md Zaini') – in place of the first plaintiff who had passed away – as representative of the estate of the first plaintiff and the other respondents. According to the defendant, after the death of the first plaintiff the defendant's cause of action against the first plaintiff was transmitted to his estate and Md Zaini, as a son and one of the beneficiaries to the deceased's estate, was the proper person to be appointed as the representative of the estate for the purpose of the relevant proceedings.

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Held (dismissing the application)

Per Hasan Lah JCA delivering the judgment of the court:

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- (1) Under r. 41 of the Rules, the defendant was permitted to make this application *ex parte*. However, the person sought to be appointed to represent the deceased's estate must give his consent to represent the estate. In this case, the defendant did not state whether Md Zaini had consented to the defendant's application. Accordingly, Md Zaini could not be appointed to represent the estate without his consent since he was not the personal representative of the deceased. This was not a proper case for an *ex parte* application. This application ought to have been served on Md Zaini as well as the other beneficiaries of the estate so that the application could be

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A heard *inter partes*. Since there was no consent from Md Zaini and this application was not served on him, the defendant's application could not be allowed. *Pratt v. London Passenger Transport Board*; *Green v. Vandekar* (foll). (paras 9, 11 & 12)

B ***Bahasa Malaysia Translation Of Headnotes***

Perayu/defendan, melalui notis usul *ex parte*, memohon untuk satu perintah di bawah k. 41 Kaedah-kaedah Mahkamah Rayuan 1994 ('Kaedah-kaedah') bahawa rayuan ini dan semua prosiding berkaitan dengannya diteruskan di antara defendan dan satu Md Zaini Haji Mohd Noor ('Md Zaini') – menggantikan plaintiff pertama yang telah meninggal dunia – sebagai wakil estet plaintiff pertama dan responden-responden lain. Menurut defendan, selepas kematian plaintiff pertama kausa tindakan defendan terhadap plaintiff pertama dihantar kepada estetnya dan Md Zaini, sebagai anak lelakinya dan salah satu benefisiari estet simati, ialah orang yang sepatutnya dilantik sebagai wakil estet tersebut bagi tujuan prosiding yang relevan.

Diputuskan (menolak permohonan)

E **Oleh Hasan Lah HMR menyampaikan penghakiman mahkamah:**

(1) Di bawah k. 41 Kaedah-kaedah, defendan dibenarkan membuat permohonan secara *ex parte*. Walau bagaimanapun, orang yang dikehendaki untuk dilantik bagi mewakili estet simati mesti bersetuju untuk mewakili estet tersebut. Dalam kes ini, defendan tidak menyatakan sama ada Md Zaini bersetuju dengan permohonan defendan. Oleh itu, Md Zaini tidak boleh dilantik untuk mewakili estet tersebut tanpa persetujuannya kerana dia bukan wakil diri simati. Ini bukanlah kes yang wajar untuk permohonan *ex parte*. Permohonan ini sepatutnya disampaikan kepada Md Zaini dan juga benefisiari-benefisiari estet yang lain supaya permohonan tersebut boleh didengar secara *inter partes*. Oleh sebab tiada persetujuan dari Md Zaini dan permohonan ini tidak disampaikan kepadanya, permohonan defendan tidak boleh dibenarkan. *Pratt v. London Passenger Transport Board*; *Green v. Vandekar* (diikuti).

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Case(s) referred to:

Pratt v. London Passenger Transport Board; Green v. Vandekar [1937] 1 All ER 473 (foll)

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Legislation referred to:

Rules of the Court of Appeal 1994, r. 41

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Rules of the Supreme Court [UK], O. 16 r. 46

For the applicant/appellant - Christina Seow; M/s Lim Kean Siew

[Appeal from High Court, Alor Setar; Civil Suit No: 12/1981]

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Reported by Suresh Nathan

JUDGMENT**Hasan Lah JCA:**

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[1] By an *ex parte* notice of motion dated 8 May 2008 the appellant (“the defendant”) applied for an order under r. 41 of the Rules of the Court of Appeal 1994 (“the Rules”) that this appeal and all the proceedings related thereto be carried on between the defendant and one Md. Zaini bin Haji Mohd Noor, in place of Haji Mohd Noor bin Haji Yakub (“the first plaintiff”) who had passed away on 3 March 2008, as representative of the estate of Haji Mohd Noor bin Haji Yakub and the other respondents (who were the second and third plaintiff in the High Court).

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[2] The defendant’s application was supported by an affidavit affirmed by Dato’ Khaw Choon Thiew @ Khoo Kiap Leng, a director of the defendant. The grounds for the application were set out in the said affidavit-in-support.

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[3] It was stated in the said affidavit that the defendant had appealed against the decision of the High Court of Alor Setar given on 12 February 1996. On 12 July 1999 the defendant’s appeal was allowed by the Court of Appeal with the order that the costs of the appeal and the costs at the court below be paid by the plaintiffs to the defendant.

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[4] The defendant began proceedings for taxation in the Court of Appeal and the taxation of the plaintiff’s bill of costs was fixed on 28 September 2007 and then adjourned to 7 December 2007 because counsel for the plaintiff was absent. It was again fixed for taxation on 16 May 2008.

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A [5] The first plaintiff passed away on 3 March 2008. According to the defendant after the death of the first plaintiff the defendant's cause of action against the first plaintiff was transmitted to his estate and Md. Zaini bin Haji Mohd Noor, as a son and one of the beneficiaries to the deceased's estate, was the proper person to be appointed as the representative of the estate of the deceased for the purpose of the proceedings for taxation.

C [6] We heard the application on 15 May 2008 and after hearing submission from learned counsel for the defendant we unanimously dismissed the defendant's application with costs.

[7] Rule 41 of the Rules provides:

D Where by reason of marriage, death or bankruptcy, or any other event occurring after the commencement of an appeal, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the appeal, it becomes necessary or desirable that any person not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties, and such new party or parties, may be obtained *ex parte* on application to the Court, upon an allegation of such change, or transmission of interest or liability, or of any such person interested having come into existence.

F [8] The defendant did not state in its supporting affidavit whether any letters of administration had been granted in respect of the deceased's estate and also did not state how many beneficiaries were there to the estate. If a personal representative of the deceased has been appointed then that personal representative would have the right to represent the estate and as such Md. Zaini bin Haji Mohd Noor would not be a proper person to represent the estate in taxation proceedings. Furthermore, the defendant did not say whether the other beneficiaries had agreed to the appointment of Md. Zaini bin Haji Mohd Noor as the representative of the estate of the deceased for the purpose of taxation proceedings.

I [9] We were mindful that under r. 41 of the Rules the defendant is permitted to make this application *ex parte*. However, the person sought to be appointed to represent the estate of the deceased must give his consent to represent the estate. In this case the

defendant did not state whether Md. Zaini bin Haji Mohd Noor had consented to the defendant's application. *Pratt v. London Passenger Transport Board*; *Green v. Vandekar* [1937] 1 All ER 473 are cases on point. In the first case the plaintiff applied under O. 16 r. 46 of the Rules of the Supreme Court for an order that the official solicitor should represent the deceased's estate and be added as a defendant. The order asked was made without the consent of the official solicitor. In the second case, the facts were similar, except that the deceased was one of the defendants in the action, and that the order was made without the knowledge of the official solicitor. The English Court of Appeal held that there was no power under O. 16 r. 46 to appoint a person against his will to represent the estate of a deceased person.

[10] Order 16 r. 46 of the Rules of The Supreme Court provides that:

If in any cause, matter, or other proceeding it shall appear to the court or a judge that any deceased person who was interested in the matter in question has no legal personal representative, the court or judge may proceed in the absence of any person representing the estate of the deceased person, or may appoint some person to represent his estate for all the purposes of the cause, matter, or other proceeding, on such notice (then the notice is specified) and the order so made, and any order consequent thereon, shall bind the estate of the deceased person in the same manner in every respect as if a duly constituted legal personal representative of the deceased had been a party to the cause, matter, or proceeding.

In both the case cited above Slessor LJ made the following observation:

RSC, Ord. 16, r. 46, does not say whether the court or judge, if the court is of opinion that a person ought to be appointed, may appoint a person in *invitum* without having obtained from that person his consent to represent the estate, but, in my opinion, it would be contrary to all principles of justice, and indeed contrary to decided authority, such as there is, to hold that that power to appoint such person to represent the estate could be made against the will and without the consent of the person sought to be appointed. Authority, if authority be needed for such a proposition, is to be found in the case of *Re Curtis and Betts* (1), where the court, Cotton, Bowen and Fry, LJ, said this among other matters, at p. 127:

It was also wrong to appoint to represent an estate a person who was unwilling to act.

A [11] Accordingly, in the instant case we were of the view that Md. Zaini bin Haji Mohd Noor could not be appointed to represent the estate without his consent as he was not the personal representative of the deceased.

B [12] Having carefully considered the matter we came to the conclusion that this was not a proper case for an *ex parte* application. This application ought to have been served on Md. Zaini bin Haji Mohd Noor as well as the other beneficiaries of the estate so that the application could be heard *inter partes*. Since
C there was no consent from Md. Zaini bin Haji Mohd Noor and this application was not served on Md. Zaini bin Haji Mohd Noor we were of the view that we cannot allow the defendant's application. For the reasons stated above we dismissed the defendant's application with costs.

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